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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42125

E.I. DUPONT DE NEMOURS AND COMPANY
v.
NORFOLK SOUTHERN RAILWAY COMPANY

Docket No. NOR 42130[1]

SUNBELT CHLOR ALKALI PARTNERSHIP
v.
NORFOLK SOUTHERN RAILWAY COMPANY

Digest:[2] This decision denies a request to place on hold two rate proceedings while the Board, in a separate proceeding, considers modifying some of its rules and procedures in rate cases.

Decided: November 29, 2012

BACKGROUND

On October 7, 2010, E.I. du Pont de Nemours and Company (DuPont) filed a complaint challenging the reasonableness of the rates charged by defendant Norfolk Southern Railway Company (NSR) for the transportation of 27 different commodities between 139 origin and destination pairs.[3] DuPont seeks rate relief under the Board's Stand-Alone Cost (SAC) methodology. Following several procedural delays, DuPont filed its opening statement on April 30, 2012, and an errata to that filing on May 17, 2012.

[1] These proceedings are not consolidated; they are being considered together for administrative purposes.

[2] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[3] The original, October 7, 2010 complaint challenges the reasonableness of rates for 146 origin and destination pairs. DuPont has since filed three amended complaints. The last of these, filed December 5, 2011, is controlling, and challenges 139 origin and destination pairs.

On July 26, 2011, Sunbelt Chlor Alkali Partnership (Sunbelt) filed a complaint challenging the reasonableness of the rates charged by defendants NSR and Union Pacific Railroad Company (UP) for the transportation of chlorine from McIntosh, Ala., to LaPorte, Tex. On May 4, 2012, Sunbelt filed an amended complaint, having entered into a voluntary settlement leading to dismissal of UP as a defendant. Sunbelt also seeks rate relief from NSR's rates under the Board's SAC methodology. Following two procedural delays, Sunbelt filed its opening statement on August 1, 2012.

On July 25, 2012, the Board issued a notice of proposed rulemaking to propose six changes to its rate reasonableness rules. Rate Regulation Reforms, EP 715 (STB served July 25, 2012). The proposed changes include curtailing the use of cross-over traffic in Full-SAC cases and modifying the approach used to allocate revenue from cross-over traffic in Full-SAC cases. Id. at 3. Following the issuance of Rate Regulation Reforms, NSR filed a motion to hold the proceeding in abeyance, pending completion of the Rate Regulation Reforms rulemaking, in each of the above-named dockets (NOR 42125 Abeyance Motion, NOR 42130 Abeyance Motion, or, collectively, Abeyance Motions).[4]

NSR's motions are each divided into three primary sections. In the first section, NSR argues that fundamental fairness dictates that the case should be held in abeyance.[5] It claims the DuPont and Sunbelt proceedings exemplify an abuse of cross-over traffic that the Board seeks to prevent in Rate Regulation Reforms, due to heavy reliance on such traffic and the associated distorting effect on the SAC analyses.[6] NSR further argues that the shipper erroneously used the Board's modified ATC methodology[7] to allocate revenues to cross-over traffic and, because NSR will advocate for a different ATC methodology, the parties' revenue evidence may be like "ships [passing] in the night."[8]

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[4] NSR filed its Abeyance Motion in Docket No. NOR 42125 on August 6, 2012, and an errata on August 10, 2012, and in Docket No. NOR 42130 on September 21, 2012. When citing to NSR's Abeyance Motion in Docket No. NOR 42125, we will be referencing the errata. On August 14, 2012, in response to Rate Regulation Reforms, UP filed a motion to hold the proceeding in Intermountain Power Agency v. Union Pacific Railroad, Docket No. NOR 42136 in abeyance. That motion will be addressed in a separate order in that proceeding.

[5] NOR 42125 Abeyance Motion 2-3; NOR 42130 Abeyance Motion 2-3.

[6] NOR 42125 Abeyance Motion 3-12; NOR 42130 Abeyance Motion 3-14.

[7] The Board adopted ATC, sometimes referred to as original ATC, in Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 31 (STB served Oct. 30, 2006), aff'd sub nom. BNSF Railway v. STB, 526 F.3d 770 (D.C. Cir. 2008), and then modified ATC in Western Fuels Ass'n v. BNSF Railway, NOR 42088, slip op. at 14 (STB served Sept. 10, 2007). Alternative ATC was proposed, and is currently being considered, in Rate Regulation Reforms, slip op. at 8.

[8] NOR 42125 Abeyance Motion at 17; NOR 42130 Abeyance Motion at 19.

The second section provides six reasons why NSR asserts that the best course of action would be to hold the cases in abeyance.[9] NSR contends that: (1) under the existing rules cross-over traffic has not operated as intended and instead has been used to distort SAC analyses and results; (2) a rulemaking is the appropriate forum for the rule changes addressed in EP 715, because these substantial changes to the existing rule should be made by notice and comment; (3) abeyance would save the parties time and money; (4) abeyance would minimize potential for inconsistent rules and irreconcilable results; (5) if cases proceed, the Board may simultaneously have to defend multiple appeals regarding potentially inconsistent cross-over traffic rules; and (6) abeyance would not materially prejudice any party.

In the third section, NSR argues that, because the Board adopted the original ATC approach through a notice and comment rulemaking, it must apply original ATC, not modified or alternative ATC, in individual rate cases until it has conducted a notice and comment rulemaking to modify its revenue allocation methodology.[10]

DuPont replies that any delay would be highly prejudicial and financially costly.[11] It also argues that the law would strongly disfavor the retroactive application to pending cases of any cross-over traffic limitations adopted in Rate Regulation Reforms.[12] Sunbelt replies with arguments similar to those made by DuPont, claiming that a delay would be highly unfair, prejudicial, and costly to Sunbelt.[13] Sunbelt, too, asserts that retroactive application of limits on cross-over traffic developed in Rate Regulation Reforms would be legally disfavored.[14] Both DuPont and Sunbelt further argue that Rate Regulation Reforms does not address, or would not impact, some of the more contentious aspects of these proceedings.[15]

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[9] NSR makes six specific arguments in Section II of its NOR 42125 Abeyance Motion and repeats substantially the same arguments in Section II of its NOR 42130 Abeyance Motion, though organized slightly differently. NOR 42125 Abeyance Motion 20-22, NOR 42130 Abeyance Motion 24-26. This decision addresses the arguments in the same manner as they are presented in the NOR 42125 Abeyance Motion.

[10] NOR 42125 Abeyance Motion at 22-24; NOR 42130 Abeyance Motion at 26-28.

[11] DuPont Reply 4-6.

[12] DuPont Reply 9-12.

[13] Sunbelt Reply 5-7.

[14] Sunbelt Reply 11-14.

[15] DuPont contends, for example, that certain issues involving their cross-over traffic evidence are not within the scope of what would be addressed in the Rate Regulation Reforms rulemaking. DuPont Reply 16-17, 32. Likewise, Sunbelt contends that the ATC methodology filed in its Opening Statement does not implicate the concerns with cross-over traffic expressed

(continued . . .)

DISCUSSION AND CONCLUSIONS

The issue presented is whether we should place these two rate cases into abeyance pending the outcome of the rulemaking proceeding in Rate Regulation Reforms. As the Supreme Court has said, "[a]n agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities." Mobil Oil Exploration & Producing Se., Inc. v. United Distribution Cos., 498 U.S. 211, 230 (1991). Absent constitutional constraints or extremely compelling circumstances, administrative agencies are "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543 (1978).

The Board has no established practice of holding cases in abeyance pending the resolution of ongoing rulemakings. Cost of Capital—2005, EP 558 (Sub-No. 9), slip op. at 5 (STB served Feb. 12, 2007). The decision whether to do so in any particular situation is highly dependent on the facts and circumstances of the case. In Major Issues in Rail Rate Cases (Major Issues NPRM), EP 657 (Sub-No. 1) (STB served Feb. 27, 2006), the Board placed all three of the then-pending SAC cases in abeyance while it addressed a proposal to make several major changes to its rate review guidelines. There, the Board determined that the scale of the proposed changes in Major Issues NPRM was a fundamental change to the process and therefore merited an across-the-board hold on all pending rate cases because the Board was proposing to depart from Ramsey pricing principals, a basic precept of Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3rd Cir. 1987), and one of the central economic underpinnings of Constrained Market Pricing. In Rate Regulation Reforms, while the Board has proposed changes that could, if adopted, have an impact on the way that stand-alone railroads (SARRs) are designed (cross-over traffic rules) and awards are determined (cost allocation methodology), these changes are not of the same fundamental nature as those proposed in Major Issues NPRM so as to warrant a one-size-fits-all approach to abeyance. The Board is maintaining the underlying precepts that cross-over traffic is an acceptable and useful simplifying tool in building a SARR, and that revenue allocation for that traffic should be based on an average total cost methodology. The proposals are modifications to these rate procedures, but the foundation remains the same. Accordingly, the Board retains significant discretion as to whether a pending case should be placed in abeyance while the Board considers the proposed rules in Rate Regulation Reforms.

We have already clearly stated that "[w]e do not propose to apply any new limitation [that may be adopted in EP 715] retroactively to . . . any pending rate dispute that was filed with

(. . . continued)
in Rate Regulation Reforms. Sunbelt Reply 17-20. Sunbelt further contends that the choice of ATC methodologies does not affect the outcome of its case. Sunbelt Reply 27-29.

the agency before the decision was served." Rate Regulation Reforms, slip op. at 17 n.11. We believed there that allowing those cases to continue "would be fair to those complainants, who relied on our prior precedent in litigating those cases." Id. Hence, it was the Board's intention that cases pending prior to the service of Rate Regulation Reforms should proceed as normal, absent some compelling reason or distinguishing factor that makes it more appropriate to place them into abeyance.

NSR presents three arguments in favor of abeyance. First, it argues that proceeding as normal would be fundamentally unfair to NSR. Second, it offers six policy arguments in favor of abeyance. Finally, NSR believes that the only way the Board can refine the cross-over traffic revenue allocation approach is through notice and comment rulemaking. We address each argument in turn below.

1. Fairness

The Board considers the fairness to both parties in determining whether to place these cases in abeyance. NSR first argues that it would be fundamentally unfair for the Board to proceed with these cases after the Board has, in NSR's view, essentially acknowledged that the current rules are unsound. It further claims that the evidence submitted in these cases exemplifies the issues the Board has identified in Rate Regulation Reforms.[16] NSR claims that the shippers' extensive use of cross-over traffic and application of the modified ATC methodology are improper, and that to apply the current rules would be arbitrary and unfairly prejudice NSR.

We do not believe it would be unfair to NSR to permit the cases against the railroad to proceed forward. NSR's fundamental unfairness arguments are best characterized as substantive arguments about the proper use of cross-over traffic in these pending cases, and involve detailed contentions specific to those matters. We will not now address these substantive arguments in resolving this procedural motion. NSR's arguments go to the merits of this case, and NSR is free to proffer such arguments in its reply evidence. The parties should have been, and continue to be, on notice that use and application of cross-over traffic, as well as ATC revenue allocation methodologies, are potential issues in these individual cases, and that parties are entitled to raise and respond to substantive arguments regarding those methodologies within those proceedings. See, e.g., Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113 (STB served June 27, 2011) (stating that the Board has concerns with the way cross-over traffic has been costed, and directing the parties to submit new evidence and arguments for how to rectify the identified issue). The Board will address any arguments related to cross-over traffic and cost allocation raised in the pending adjudications, even as it completes its consideration of those issues more broadly in Rate Regulation Reforms.

[16] NOR 42125 Abeyance Motion 2-3; NOR 42130 Abeyance Motion 2-3.

Sunbelt and DuPont make fairness arguments to support their request that the Board allow these cases to continue during the pendency of Rate Regulation Reforms. Among other arguments, both complainants cite to the fact that they filed their cases nearly two years ago, well before the Board initiated the rulemaking. They also note that considerable evidence has already been filed, including opening evidence on market dominance, the design of the SARR, and the operating plans. Complainants argue that the Board's statement that it would be unfair to apply any new rules to already pending cases cannot be reconciled with NSR's requests to hold these cases in abeyance so that any adopted rules can be applied.

After considering the fairness arguments of both NSR and the complainants, the Board finds that the balance tips in favor of complainants. It is the Board's intent to consider the matters in Rate Regulation Reforms on an expedited basis, similar to Major Issues. Nonetheless, from both a fairness and timing standpoint, we do not believe it is appropriate to put a hold on these long-pending cases.

2. Policy Arguments

NSR next presents six policy arguments for why the best course of action is to hold the proceedings in abeyance. First, it argues that cross-over traffic has not operated as intended and has been used to distort the SAC analyses and results. NSR's observations on this issue are essentially a merits argument, and, as discussed above, we will not address these substantive arguments here.

Second, NSR argues that a rulemaking is the appropriate forum for the types of changes contemplated in Rate Regulation Reforms. It is well established that the choice between rulemaking and adjudication lies, at the first instance, within the agency's discretion. NLRB v. Bell AeroSpace Co. Div. of Textron, Inc., 416 U.S. 267, 294 (1974), overruled on other grounds by NLRB v. Hendricks Cnty. Rural Elec. Membership Corp., 454 U.S. 170 (1981). In general, more significant changes with broader application should be made through rulemaking rather than adjudication. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 335 (2002); Am. Airlines v. DOT, 202 F.3d 788, 798 (5th Cir. 2000) (holding that because DOT's order interpreted the rights of a small number of parties properly before it, the agency did not abuse its discretion by acting through an adjudicatory proceeding). If a new agency policy represents a significant departure from long established and consistent practice that substantially impacts the regulated industry, the agency should submit the change for notice and comment. Shell Offshore Inc. v. Babbitt, 238 F.3d 622, 630 (5th Cir. 2001); see, e.g., Pub. Serv. Co. of Colo. v. Burlington N. & S.F. Ry., 7 S.T.B. 589, 624 (2004) (finding that acceptance of a party's proposal would be a significant departure from Board practices, and therefore declining to address that proposal within the adjudication), petition for reconsideration on other grounds granted in part and denied in part NOR 42057 (STB served Jan. 19, 2005), aff'd sub nom. BNSF Ry. v. STB, 453 F.3d 473 (D.C. Cir. 2006). But as discussed above, the changes proposed in Rate Regulation Reforms are not fundamental departures from long established and consistent practice. And despite its contention that "[t]he Board appears to have implicitly acknowledged"

that a rulemaking is the appropriate forum for the changes contemplated here,[17] NSR has cited no authority for the proposition that the Board may not proceed with an adjudication while considering a broader rule change. See Aeolus Sys., LLC v. United States, 79 Fed. Cl. 1, 15 (Ct. Fed. Cl. 2007) ("[P]laintiff has cited no authority, and the court has found none, which supports plaintiff's argument that an agency may not interpret its own regulations while adjudicating a protest, and at the same time carry on more general rulemaking activities to address prospective application of its regulations."). The complainant's opening evidence in these cases has already been submitted, and the Board can address any reply arguments raised by NSR that the current rules should be modified to prevent distorted results from the complainants' use of cross-over traffic in these adjudications.

NSR's third and sixth arguments for holding the proceedings in abeyance are that it will save both time and money for the parties and will not materially prejudice any party.[18] DuPont and Sunbelt each counter this argument and claim it would be both expensive and time consuming; DuPont adds that it would be prejudicial to hold the proceeding in abeyance because it has already expended substantial time and money developing its case in accordance with the prevailing rules.[19] These arguments have been considered, along with expedience in adjudication, and on balance, we believe that moving forward with the two proceedings at issue in this decision is the proper course of action.

NSR's fourth and fifth arguments for why these cases should be held in abeyance discuss the potential for defending simultaneous appeals against potentially conflicting rules.[20] While NSR argues that the Board may have to deal with competing appeals if it does not hold these case in abeyance, this argument is purely hypothetical. We do not yet know whether and on what grounds any pending or future cases may be appealed. SAC cases are intensely fact specific and subject to appeal on the Board's application of any number of its rate reasonableness rules. It is also true that there could be multiple separate appeals on different issues of any rulemaking. Although there may, in fact, be complicated appeals procedures in these cases, given that the balance of fairness tips in favor of complainants here, we will not delay these proceedings on the basis that the Board may have to participate in additional litigation.

3. ATC: Rulemaking v. Adjudication

In its third section, NSR argues that if the Board does not hold the proceedings in abeyance, it must apply original ATC because any modification to the revenue allocation

[17] NOR 42125 Abeyance Motion 20; NOR 42130 Abeyance Motion 24.

[18] NOR 42125 Abeyance Motion 21-22; NOR 42130 Abeyance Motion 25-26 (NSR did not include the materially prejudice argument in this motion).

[19] DuPont Reply 4-8; Sunbelt Reply 6-10.

[20] NOR 42125 Abeyance Motion 21-22; NOR 42130 Abeyance Motion 26.

methodology for cross-over traffic must be addressed in a rulemaking.[21] This argument is irrelevant to the question presented at this time: whether to place these cases into abeyance. The question of which revenue allocation methodology should be applied within a particular rate case is a substantive question that is more appropriately addressed within the individual proceedings and will not be addressed further here. To the extent NSR is suggesting that we should place these cases into abeyance because rulemaking is the only permissible procedural vehicle to remedy NSR's perceived problems with the revenue allocation methodology, this suggestion is duplicative of its second policy argument discussed above.

In conclusion, the Board has considered the impacts of holding these cases in abeyance, the significance of the changes being proposed in Rate Regulation Reforms, our ability to address important merits and methodology questions in the adjudications, and the impact of our abeyance decision on the parties. Because the complaints in these cases were filed nearly two years before the Board proposed changes in Rate Regulation Reforms; the parties have already filed evidence with regard to market dominance, SARR design, etc.; the parties are free to address appropriate methods for costing and allocating revenues within the context of the individual SARRs presented in those dockets, and the Board strives to rule expeditiously on pending matters when appropriate, we believe the best course of action is to allow these proceedings to move forward.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NSR's motion to hold the Docket No. NOR 42125 proceeding in abeyance is denied.

2. NSR's motion to hold the Docket No. NOR 42130 proceeding in abeyance is denied.

3. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman. Commissioner Begeman dissented with a separate expression.

Commissioner Begeman, dissenting:

I must dissent from the Board's decision.

[21] NOR 42125 Abeyance Motion 22-27; NOR 42130 Abeyance Motion 26-32.

Prior to issuing the pending Rate Regulation Reforms rulemaking, the Board had already acknowledged that there may be better approaches for allocating cross-over revenues than the latest one it had established. See W. Fuels Ass'n v. BNSF Ry., NOR 42088 (STB served June 15, 2012). Despite my objection, the Board chose to uphold its use of that methodology in the one case where it had been applied, rather than fixing it first. The Board did so while at the same time announcing plans to begin a rulemaking proceeding to develop a superior alternative. That proposed alternative is included in the pending rulemaking at issue here.

The Board's decision suggests that pending cases would proceed using the existing SAC processes, but that arguments to change those same processes would be entertained within individual cases. I am not convinced, however, that the Board can or should adopt significant changes to its methodologies outside of a formal rulemaking process. The fact that the Board has started a rulemaking to include the proposed SAC changes indicates that, at the very least, it agrees that the formal rulemaking process is the appropriate way to proceed. Now is the time for the Board to firmly commit itself to swiftly completing the Rate Regulation Reforms rulemaking, rather than inviting parties to maneuver around it.

Given the problems already identified with the cross-over revenues allocation methodology that exists today, and the legal uncertainty over making substantive changes to it outside of the rulemaking process, I cannot support the Board's approach. Moreover, proceeding in accordance with this decision could lead to lengthy legal disputes, adding even more delay to the final resolution of these cases than if they were held in abeyance now, for what I hope would be a short period of time, in order to complete the rulemaking.

It is not my objective to needlessly hold up these or any other matters pending at the Board. In fact, I strongly believe that the Board needs to make a much greater effort toward improving the timeliness of its rate docket, along with all cases that come before it. I recognize, of course, that expediency should not come at the expense of the Board providing fair, accurate, and unbiased adjudication processes to all stakeholders.

Unfortunately, this decision causes more uncertainty than it answers about how, exactly, these cases will be adjudicated. On the one hand, it will subject parties to litigating rate cases under flawed methodologies that the Board has essentially disavowed, while on the other, it will entertain significant modifications to the SAC process within the context of these same cases.

For these reasons, I dissent from the Board's decision.